



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND AT MURANGA

ELC NO 255 of 2017

MOSES IRUNGU KIHARAPLAINTIFF

VS

JANE NJERI MUNYUKO DEFENDANT

JUDGMENT

1. The Plaintiff claims a proprietary right over the suit property known as Loc.8/GATURI/105 having obtained the same through transfer to him by his father one Kihara Magondu.
2. The Plaintiff by a plaint dated 2/03/2016 sued the Defendant for trespass on his above stated suit land seeking the following relief:
 - (a) An order for vacant possession of the suit land property known as Loc.8/GATURI/105 and eviction of the Defendant himself, his servants and/or his agents from the suit property.
 - (b) A permanent injunction restraining the Defendant whether by himself or her servants or agents or otherwise howsoever from remaining on or continuing in occupation and trespassing on the suit property.
 - (c) General damages for trespassing
 - (d) Costs of this suit with interest
 - (e) Any other relief the Court may deem fit.
3. The Plaintiff avers that he is the sole registered owner of all that piece of land known as Loc.8/GATURI/105 (herein referred to as the suit property) and is therefore entitled to possession of the suit property. That he acquired the suit land by way of transfer of land having fulfilled all the legal requirements.
4. That sometimes in 2014 the Defendant illegally and without consent of the Plaintiff entered the suit property, trespassed on it and took possession of it without any color of right and has continued thereon. That the Defendant has alienated the suit land to strangers and illegally leased the suit land to them.
5. The Plaintiff avers that as a result of the Defendant's actions he has suffered loss and damage as he has been deprived of the use and quiet enjoyment of suit property and has been denied access to the suit property and he is now incapable of using the suit property.
6. The Plaintiff contends that on numerous occasions he verbally requested the Defendant to vacate the suit premises but the Defendant has refused to vacate the suit property and the Plaintiff has continued to suffer loss.
7. The Defendant filed her defence dated 20/05/2016 in which she mainly denies the averments in the plaint and avers that the suit land belonged her late mother one Njoki Kimani who was the sole owner. She claims that the Plaintiff obtained the suit land fraudulently. It is her claim that the Plaintiff's father Kihara Magondu obtained letters of administration on her deceased mother's estate without her knowledge and consent and proceeded to have the suit property registered in his name. That the suit land was then transferred to the Plaintiff. The Defendant claims that she has been in occupation and has been cultivating half share of the suit land. She is of the view that the Plaintiff cannot seek to evict her from a parcel of land that he fraudulently obtained. The Defendant claims that the suit is fatally defective and an abuse of Court process and adds that the Plaintiff's suit is Res judicata as this matter was heard and determined in Murang'a L.D.T 24 of 2000.
8. The Plaintiff was represented by the firm of Muchoki Kang'ata Njenga Co. advocates who later applied to cease acting on 21/09/2016.

9. At the hearing the Plaintiff testified that he acquired the suit land by way of transfer from his father Kihara Magondu as an inheritance in the years 1993. That the land was given to him by his father. That he did not have letters of administration of his father's estate. He wished to rely on his witness statement and list of documents dated 2/3/2016. In his written statement the Plaintiff reiterates the contents of the plaint and avers that he is the sole registered owner of the suit land having obtained the same by way of transfer from his father way back in 1993. He avers that the transfer was procedural and legal. He claims that the Defendant entered into the suit land in the year 2015 and took possession of it and started cultivating on it without his consent. That he has suffered loss as he has been denied access and use of the suit land. He annexed to the plaint copies of the following documents; Title deed of Loc.9/GATURI/105 in his names Moses Irungu Kihara which was issued to him on 3/9/1993, a copy of green card that shows how the suit land changed hands from initial owner Njoki Kimani (registered in 1961) to Kihara Magondu – the Plaintiff's father (registered in 1983 as the personal representative of Njoki Kimani and later to the Plaintiff in 1993. Lastly he attached a copy of demand letter to the Defendant seeking to evict her from the suit land.

The Defence case.

10. The Defendant called two other witnesses at the hearing of the defence case. DW1 – states that she was given the land by her mother and has been in cultivation. That the Plaintiff changed ownership after the death of her mother. That she filed L.D.T case and a ruling delivered which was later adopted as Judgment of the Court. That the Chief's letter identifies her as only beneficiary. During cross examination she conceded that she does not reside on the suit land but at her husband's home. She disputes that the land was given to the Plaintiff's father and confirmed that suit land was never registered in her name.

11. DW2 – Ndungu Kimani stated that he was an uncle to Plaintiff and a cousin to the Defendant. He stated that the suit land was left to Defendant. That this land neighbors the suit land. He contends that the land was not given to Plaintiff's father and spoke of some dispute with the Plaintiff's father during demarcation.

12. DW3 – Julius Kimani Mburu son of Defendant testified that the Plaintiff took the suit land by deceit. That he lived on his grandmother's land sometimes and took care of her and was aware of the dispute.

13. In his submissions the Plaintiff avers that he is the legal sole registered owner of the suit land having acquired it through a transfer made to him by his father Kihara Magondu in the year 1993. That since he acquired the land he has been residing on the suit land with his family and has made several developments thereon by building residential home and cultivating crops. That he supported his ownership rights with documentary evidence in form of title deed for the suit land in his name and has explained to the Court how the property changed hands through legal means.

14. He concedes the fact that the Defendant is the only child of the original registered owner of the suit land but avers that she has failed to demonstrate to the Court that she is entitled to a share of the suit land. He avers that the Defendant is married and resides with her husband in a different parcel of land away from the suit land and that she has been staying away from the suit land for a long time even during the lifetime of her deceased mother.

15. The Plaintiff avers that the Defendant has pleaded fraud against the Plaintiff in the manner in which he obtained the suit land but has failed to provide any documentary evidence to support that allegation.

16. The Plaintiff avers that the suit land was transferred to his father way back in 1983 and he lived and utilized the suit land during his lifetime, the Defendant never challenged that transfer or his occupation of the suit land all that while until 2015 when she started trespassing on the suit land.

17. He faults the award given by the L.D.T tribunal for having been irregular and that the tribunal lacked jurisdiction. He also faults the Defendant for failing to support her claim with documentary evidence neither has she raised any counterclaim. For those reasons he is of the view that the Plaintiff's claim ought not to succeed in terms of the prayers sought.

18. The Defendant submits that her mother Njoki Kimani was the original registered owner of the suit land and the Defendant was her only child and therefore her only legal beneficiary. She avers that she got married in the same location where her mother lived and she would frequently go to visit her mother and cultivate on her land. She claims to have taken possession of the suit land immediately upon the demise of her mother.

19. The Defendant contends that the Plaintiff's father claimed to have reclaimed a portion of the suit land that had allegedly been sold to one Marubu Gikuru for a value of ksh.400/= which the Plaintiff's father paid and proceeded to cultivate on that portion of land. That upon the death of the Defendant's mother he intermeddled in her estate by transferring the suit land to himself in the pretext of being her personal representative. Plaintiff's father was only a neighbor to her mother and not their relative therefore he could not have been her mother's personal representative.

20. She alludes to the proceedings before the District Land Dispute Tribunal Court at Kahuro of 1998 which proceeded to share the deceased's estate into 3 equal portions of 0.77acre shares which was later adopted as the judgment of the Court in Murang'a LDT 24 of 2000; but concedes that the proceedings and award were a nullity as the tribunal lacked jurisdiction to deliberate on matters of succession and title. It is worth noting that at the time the L.D.T proceedings happened while the suit property was already transferred and registered in the name of the Plaintiff and he was not a party to the tribunal proceedings.

21. It is the Defendant's claim that the Plaintiff's father obtained the title in the suit land illegally and hence the subsequent transfer to the Plaintiff was a nullity and seeks intervention of the Court to revoke and cancel the title issued to the Plaintiff. She prays for the title to revert to the original owner for proper administration. And prays for the suit to be dismissed with costs and restraining orders to issue against the Plaintiff.

22. I have carefully considered the pleadings, evidence and rival submissions filed and exchanged between parties.

23. As to who is the legal owner of the suit, the Plaintiff is the registered owner of the suit land having obtained and held a title for the property since 1993. He has adduced evidence of actual occupation and use of the suit premises for all that time. The green card indicated that the property was transferred to him from one Kihara Magondu whom the Court has been informed was his father. The green card shows that the Kihara Magondu acquired the land as the personal representative of Njoki Kimani. It also shows that the Plaintiff acquired the land from Kihara Magondu as a gift in 1993.

24. Under section 26 of the Registration of Land Act,

“ the certificate of Title issued by the Registrar upon registration shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except ;

a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or

b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

25. It is therefore clear that the title of a registered proprietor of land can only be subjected to challenge on the grounds of fraud or misrepresentation and can only be challenged in accordance with the process outlined by the law. Though the Defendant pleaded fraud in her defence, she has not proved that the Plaintiff obtained the title through fraud or misrepresentation. The Defendant claims that the Plaintiff is a stranger to her and that the Plaintiff's father was only a neighbor to her mother however DW2 informed the Court that in fact the Plaintiff and the Defendant are relatives. The Defendant has not raised any counterclaim on the title of the suit land.

26. The Defendant has alluded to some succession proceeding instituted by the Plaintiff's father without her knowledge and consent. It's to be noted that the proper forum to address those grievances would be before the succession Court that determined the succession matter and by way of revocation of grant, perhaps.

27. Having found that the Plaintiff's holds an indefeasible interest to the suit land whilst the Defendant has no valid legal claim to the suit land, the Defendant therefore has no right to enter or remain in the suit land, her presence there amounts to trespass. Once trespass to land is established it is actionable *per se* and indeed no proof of damage is necessary for the Court to award general damages. That notwithstanding I note that the Plaintiff did not present any tabulations to guide the Court in this endeavor. I have accordingly provided a nominal value of Kshs 20,000/- from the alleged commencement of continued trespass in 2014 to date.

28. In the circumstances the Plaintiff's claim succeeds as follows;

a. The Defendant, her servants and/or his agents are hereby ordered to vacate the suit land property known as Loc.8/GATURI/105 within the next 60 days from the date of this judgement. In default eviction to issue as per law provided.

b. A permanent injunction restraining the Defendant whether by herself or her servants or agents or otherwise howsoever from remaining on or continuing in occupation and trespassing on the suit property.

c. General damages for trespass in the sum of Kshs 20,000/-.

d. Costs of this suit in favour of the Plaintiff.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 19TH DAY OF APRIL 2018.

J.G. KEMEI

JUDGE